

ALBRIGHT, STODDARD, WARNICK & ALBRIGHT
A Professional Corporation
MARK ALBRIGHT
gma@albrightstoddard.com
801 S. Rancho Drive
Building D
Las Vegas, Nevada 89106
Telephone: (702) 384-7111
Facsimile: (702) 384-0605

SHEPPARD, MULLIN, RICHTER & HAMPTON LLP
A Limited Liability Partnership
Including Professional Corporations
GREGORY P. BARBEE, Cal. Bar No. 185156
gbarbee@sheppardmullin.com
BETHANY L. HENGSBACH, Cal. Bar No. 243958
bhengsbach@sheppardmullin.com
333 South Hope Street, 48th Floor
Los Angeles, California 90071-1448
Telephone: 213-620-1780
Facsimile: 213-620-1398

Attorneys for Defendants

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

STEVEN KLEIN, WILLIAM J.
BROOKSBANK, DONAVON
JOHNSON, KEVIN BURK, JACK
WHISTLER and JOSEPH F. MANNIX,
individually, and on behalf of all other
similarly situated,

Plaintiffs,

v.

FREEDOM STRATEGIC PARTNERS,
LLC, JOVAN VERCEL, JR., KENNETH
M. WIDNER, FREEDOM WIRELESS.,
DOUGLAS V. FOUGNIES, AND
LARRY L. DAY,

Defendants.

Case No.

**DEFENDANTS FREEDOM
STRATEGIC PARTNERS, LLC,
JOVAN VERCEL, JR., KENNETH M.
WIDNER, FREEDOM WIRELESS,
DOUGLAS V. FOUGNIES, AND
LARRY L. DAY'S NOTICE OF
REMOVAL OF ACTION PURSUANT
TO 28 U.S.C. §§ 1332, 1441, AND 1446**

[Complaint Filed: August 29, 2008]

[Declaration of Robert Boland filed
concurrently herewith]

1 TO THE HONORABLE JUDGES OF THE UNITED STATES DISTRICT
2 COURT, DISTRICT OF NEVADA, AND TO PLAINTIFFS AND THEIR ATTORNEYS
3 OF RECORD:

4
5 PLEASE TAKE NOTICE that Defendants, Freedom Strategic Partners, LLC, Jovan
6 Vercel, Jr., Kenneth M. Widner, Freedom Wireless, Inc., Douglas V. Fougnes, and Larry
7 L. Day ("Defendants"), by their undersigned attorneys, pursuant to 28 U.S.C. §§ 1332,
8 1441 and 1446, hereby remove to the United States District Court for the District of
9 Nevada, the action captioned *Steven Klein, et al. v. Freedom Strategic Partners, LLC, et al.*,
10 which is currently pending in the District Court of Clark County Nevada, as Case No.
11 A570725 (hereinafter the "State Court Action").

12 13 I. THE NATURE OF THE ACTION

14 1. Plaintiffs allege that they are investors in certain partnerships
15 purportedly formed by Defendants to fund the enforcement of various mobile telephone
16 patents held by Defendant Freedom Wireless ("Royalty Participation Partnerships").
17 (Complaint ¶1-2, Ex. A).¹ Plaintiffs seek recovery for royalty payments they allege are
18 due and owing from Defendants as a result of certain litigation settlements and licensing
19 agreements obtained by Defendants. (Complaint ¶27-98, Ex. A).

20 21 II. THE PARTIES AND THEIR CITIZENSHIP

22 2. Defendant Freedom Strategic Partners, LLC ("Freedom Strategic") is
23 a limited liability corporation organized under the laws of the State of Nevada with its
24 principal place of business located in Arizona. The sole member of Freedom Strategic is
25 Freedom Wireless, a Nevada corporation. (Complaint ¶12, Ex. A; Declaration of Robert

26
27 ¹ Filed herewith as Exhibit A to this Notice of Removal are copies of all of the
28 pleadings, processes and orders that have been served upon Defendants to date, and
that have been filed in the State Court Action.

1 Boland ("Boland Decl.") ¶ 2). Thus, Freedom Strategic is a citizen of Nevada and Arizona
2 for purposes of diversity jurisdiction. *See* 28 U.S.C. § 1332(c).

3
4 3. Defendant Freedom Wireless is a corporation organized under the
5 laws of the State of Nevada with its principal place of business located in Arizona.
6 (Complaint ¶ 15, Ex. A, Boland Decl. ¶ 3). Thus, Freedom Strategic is a citizen of Nevada
7 and Arizona for purposes of diversity jurisdiction. *See* 28 U.S.C. § 1332(c).

8
9 4. Defendant Jovan Vercel is a resident and citizen of Arizona. (Boland
10 Decl. ¶ 4).

11
12 5. Defendant Kenneth Widener is a resident and citizen of Arizona.
13 (Boland Decl. ¶ 5).

14
15 6. Defendant Douglas Fournies is a resident and citizen of Arizona.
16 (Boland Decl. ¶ 6).

17
18 7. Defendant Larry Day is a resident and citizen of Arizona. (Boland
19 Decl. ¶ 7).

20
21 8. According to the Complaint, Plaintiff Steven Klein is a resident and
22 citizen of Nevada. (Complaint ¶ 6, Ex. A).

23
24 9. According to the Complaint, Plaintiff William Brooksbank is a
25 resident and citizen of Arizona. (Complaint ¶ 7, Ex. A).

26
27 10. According to the Complaint, According to the Complaint, Plaintiff
28 Donovan Johnson is a resident and citizen of Tennessee. (Complaint ¶ 8, Ex. A).

1 11. According to the Complaint, Plaintiff Kevin Burk is a resident and
2 citizen of Arizona. (Complaint ¶ 9, Ex. A).

3
4 12. According to the Complaint, Plaintiff Jack Whistler is a resident and
5 citizen of Illinois. (Complaint ¶ 10, Ex. A).

6
7 13. According to the Complaint, Plaintiff Joseph Mannix is a resident of
8 Florida and Pennsylvania. (Complaint ¶ 11, Ex. A). Therefore, Plaintiff Mannix is a
9 citizen of Florida and Pennsylvania. *See State Farm Mut. Auto Ins. Co. v. Dyer*, 19 F. 3d
10 514, 520 (10th Cir. 1994) (residence is prima facie evidence of domicile for purposes of
11 citizenship in diversity cases).

12
13 **III. REMOVAL JURISDICTION UNDER THE CLASS ACTION FAIRNESS**
14 **ACT ("CAFA")**

15 14. The CAFA amended the diversity jurisdiction statute, 28 U.S.C. §
16 1332, by adding provisions that give federal courts original jurisdiction in class actions
17 where the following factors are met:

- 18
19 a. the aggregate amount in controversy exceeds \$5,000,000;
20
21 b. any member of the plaintiff class is a citizen of a State different from
22 any defendant or any member of the plaintiff class is a citizen or
23 subject of a foreign state and any defendant is a citizen of a State
24 ("minimal diversity");
25
26 c. the primary defendants are not states, state officials, or other
27 government entities against whom the district court may be foreclosed
28 from ordering relief; and

1 d. the number of members of the plaintiff class is 100 or more.

2
3 28 U.S.C. § 1332(d)(2), (d)(5); *see also Lowdermilk v. United States Bank*
4 *National Association*, 479 F.3d 994, 997 (9th Cir. 2007).

5
6 **A. Minimal Diversity**

7 15. In the present case, the minimal diversity requirement of the CAFA
8 has been met. As noted above, Defendants are citizens of Nevada and Arizona and
9 Plaintiffs are citizens of Tennessee, Illinois, Pennsylvania, Nevada and Arizona.
10 Accordingly, the minimal diversity requirement of the CAFA is satisfied. See 28 U.S.C. §
11 1332(d)(2)(A) & (B).

12
13 16. Also in the present case, none of the Defendants is a state, state
14 official, or other government entity "against whom the district court may be foreclosed
15 from ordering relief."

16
17 **B. Class Size**

18 17. The putative class, as defined in Plaintiffs' Complaint, is "all persons
19 who purchased or otherwise acquired [u]nits of the [p]artnerships and held those [u]nits as
20 of the date that any [r]oyalties were realized by Freedom Wireless." (Complaint ¶ 143, Ex.
21 A). Plaintiffs' Complaint asserts that there are approximately 1,750 partners who invested
22 in the partnerships at issue (Complaint ¶ 144, Ex. A). Thus, even if, as the Complaint
23 alleges, there may be some investors who disposed of their partnership units prior to the
24 date any royalties were realized by Freedom Wireless, the class membership clearly is well
25 in excess of 100 and meets the CAFA numerosity requirement.

1 **C. Amount In Controversy**

2 18. The Complaint does not specify the amount of damages Plaintiffs
 3 seek.² Accordingly, Defendants' burden to demonstrate that the amount in controversy
 4 meets the CAFA threshold is very low. Defendants need only provide evidence that it is
 5 "more likely than not" that the stakes exceed \$5,000,000. *Abrego v. The DOW Chemical*
 6 *Company*, 443 F.3d 676, 683 (9th Cir. 2006); *see also Sanchez v. Monumental Life Ins. Co.*,
 7 102 F.3d 398, 404 (9th Cir. 1996) ("Where the complaint does not specify the amount of
 8 damages sought, the removing defendant must prove by a preponderance of the evidence
 9 that the amount in controversy requirement has been met. [citations omitted] Under this
 10 burden, the defendant must provide evidence that it is 'more likely than not' that the
 11 amount in controversy satisfies the federal diversity jurisdictional amount requirement").

12
 13 19. While Plaintiffs' Complaint does not set forth the precise amount of
 14 money being sought from Defendants, the allegations therein make it clear that the
 15 aggregate amount in controversy for the putative class exceeds \$5,000,000. *See* 28 U.S.C.
 16 § 1332(d)(6) ("the claims of the individual class members shall be aggregated to determine
 17 whether the matter in controversy the sum or value of \$5,000,000.").

18
 19 20. Plaintiffs claim that the amount owed, from one settlement alone, to
 20 the Royalty Participation Partnerships in which putative class members invested equals
 21 \$32,409,765. (Complaint ¶ 117, Ex. A). In addition to this \$32,409,765, Plaintiffs seek
 22 further unspecified damages from other alleged settlements and licensing agreements.
 23 (Complaint ¶ 49-76; 91-98, Ex. A).

24
 25
 26 ² Plaintiffs' Complaint seeks "compensatory damages . . . in excess of \$10,000 . . . punitive
 27 damages . . . in excess of \$10,000" plus "attorneys' fees and costs." (Complaint ¶ 49, Ex.
 28 A).

21. Thus, it is clear from the aggregate damages Plaintiffs seek that it is "more likely than not" that the amount in controversy exceeds \$5,000,000. *Abrego*, 443 F.3d at 683. Accordingly, CAFA's jurisdictional threshold for amount in controversy is met. 28 U.S.C. § 1332(d).

D. CAFA Exceptions Are Not Applicable

22. Further, while 28 U.S.C. § 1332(d)(3)&(4) does recognize situations where this Court may or must decline jurisdiction despite the fact that the minimal diversity and the amount in controversy requirements of § 1332(d)(2) are satisfied, Plaintiffs shoulder the burden of establishing that any of these exceptions apply, and cannot meet this burden in the present case. *Serrano v. 180 Connect, Inc.*, 478 F.3d 1018, 1024 (9th Cir. 2007) (holding that party seeking remand of case removed under CAFA, not removing party, bears burden of proof to establish CAFA exception).

23. First, only one out of six named Plaintiffs is a citizen of Nevada. Complaint ¶¶ 6-11, Ex. A. Moreover, Plaintiffs cannot establish that greater than one-third of the putative class members are citizens of Nevada, since, upon information and belief, only fourteen partners reside in Nevada. *See* 28 U.S.C. §§ 1331(d)(3)(discretionary declination of jurisdiction limited to situations where "greater than one-third but less than two-thirds of the members of all proposed plaintiff classes in the aggregate and the primary defendants are citizens of the state where the action was originally filed."); *See also* Boland Decl. ¶ 8, 9.³

³ The discretionary declination of jurisdiction in 1332(d)(3) does not apply for numerous other reasons which need not be argued here since Plaintiffs cannot meet the threshold burden of establishing that greater than one-third of the proposed class members are citizens of Nevada.

24. Second, Plaintiffs are likewise unable to establish that two-thirds of all proposed class members are citizens of Nevada, so neither the "local controversy" exception nor the "home controversy" exception applies. *See* 1331(d)(4)(A)(local controversy mandatory declination limited to cases where "greater than two-thirds of the members of all proposed plaintiff classes in the aggregate are citizens of the State in which the action was originally filed";⁴ *See also* 1331(d)(4)(B)(home state controversy mandatory declination limited to cases where "two thirds or more of the members of all proposed plaintiff classes in the aggregate, and the primary defendants, are citizens of the State in which the action was originally filed.")). *See also* Boland Decl. ¶ 8, 9.

IV. VENUE

25. Venue in the District of Nevada is proper pursuant to 28 U.S.C. § 1441(a) because the county in which the State Court Action was pending is found within this District.

V. DEFENSES

26. The removal of this action to the District of Nevada does not waive Defendants' ability to assert any defense to this action.

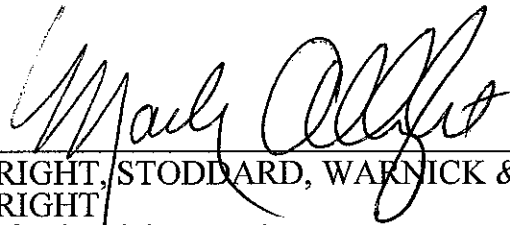
27. Defendants have filed a true and correct copy of this Notice of Removal with the District Court for Clark County.

⁴ The mandatory declination of jurisdiction in 1332(d)(4)(A) and (B) does not apply for numerous other reasons which need not be argued here since Plaintiffs cannot meet the threshold burden of establishing that greater than two-thirds of the proposed class members are citizens of Nevada.

1 WHEREFORE, Defendants have removed this action to the United States
2 District Court for the District of Nevada, in accordance with the statutes in such cases
3 made and provided.
4

5 Dated: October 10, 2008
6

7
8 By



ALBRIGHT, STODDARD, WARNICK &
ALBRIGHT
A Professional Corporation
MARK ALBRIGHT
gma@albrightstoddard.com
801 S. Rancho Drive
Building D
Las Vegas, Nevada 89106
Telephone: (702) 384-7111
Facsimile: (702) 384-0605

15 SHEPPARD, MULLIN, RICHTER & HAMPTON
16 LLP
17 A Limited Liability Partnership
18 Including Professional Corporations
19 GREGORY P. BARBEE, Cal. Bar No. 185156
20 gbarbee@sheppardmullin.com
21 BETHANY L. HENGSBACH, Cal Bar No.
22 243958
23 bhengsbach@sheppardmullin.com
24 333 South Hope Street, 48th Floor
25 Los Angeles, California 90071-1448
26 Telephone: 213-620-1780
27 Facsimile: 213-620-1398
28

Attorneys for Defendants